Order

Michigan Supreme Court
Lansing, Michigan

May 29, 2020

160740 & (63)

Bridget M. McCormack,
Chief Justice

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

DAVID A. MAPLES,
Plaintiff-Appellant,

v

SC: 160740
COA: 343394
Court of Claims: 17-000135-MZ

STATE OF MICHIGAN,
Defendant-Appellee.
_____/

On order of the Court, the motion to docket application for leave to appeal is GRANTED. The application for leave to appeal the May 14, 2019 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(H)(1).

The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the proffered evidence is "new evidence" under MCL 691.1752(b). In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The Court respectfully directs the Attorney General as appellee to file separate supplemental briefs arguing both sides of the question presented within 21 days of being served with the appellant's brief. The appellee shall also electronically file appendices, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's briefs. The parties should not submit mere restatements of their application papers. The time allowed for oral argument shall be 15 minutes for each side of the question presented. MCR 7.314(B)(2). The appellant may award part of his time to the Attorney General.

CLEMENT, J. (*concurring in part and dissenting in part*).

I dissent from the Court's order granting plaintiff's motion to docket his application. The Court of Appeals ruled against plaintiff on May 14, 2019. See *Maples v Michigan*, 328 Mich App 209 (2019). Plaintiff then attempted to file an application for leave to appeal in this Court, but selected the wrong menu option in our TrueFiling software and filed the

application in the Court of Appeals instead. Since this occurred on the deadline to file his application in this Court, his subsequent efforts to file an application in this Court were untimely, and on October 30, 2019, we denied his motion to accept his application. *Maples v Michigan*, 504 Mich 1003 (2019). However, on November 22—more than six months after the original opinion had issued, and almost one month after this Court had rejected his untimely application—the Court of Appeals ordered, sua sponte, certain amendments to its opinion in this matter. On the strength of these amendments, plaintiff filed a new application in this Court. Our clerk's office initially rejected that application, but plaintiff refiled it along with a motion to accept his application, and the matter was referred to the Justices.

I believe it is improper for this Court to docket this application. Plaintiff had 42 days to file an application for leave to appeal the Court of Appeals' decision. MCR 7.305(C)(2)(a). We have already held that he failed to file a timely application under that rule. That timeliness requirement is subverted when we reset it because the Court of Appeals ordered a sua sponte correction to its opinion. Admittedly, our court rules do not squarely resolve what should be done here, but in deciding whether to docket the application under these circumstances, I believe we should do our best to analogize to what the court rules do recognize. The closest analogy, in my view, is to those situations in which the Court of Appeals issues an unpublished opinion but then grants a subsequent publication request. Under such circumstances, the 42-day clock resets from the date of the reissued published opinion. See MCR 7.305(C)(2)(d). Of course, publication requests must be made within 21 days of the issuance of either the Court of Appeals' opinion or an order denying a timely motion for reconsideration, MCR 7.215(D)(1), so that window is not open indefinitely. Our decision to reset the 42-day clock when the Court of Appeals takes such action is motivated by the jurisprudential consequences of publication, which gives an opinion "precedential effect under the rule of stare decisis," MCR 7.215(C)(2), and binds future panels of the Court of Appeals, MCR 7.215(J)(1). Under these circumstances, it is understandable that a party who may have been content to accept an unsatisfactory unpublished opinion will prefer Supreme Court review once the opinion will control future cases as well.

The question in my mind, then, is whether the change the Court of Appeals ordered is a substantive change to the opinion, which changes its legal significance in an analogous way to ordering publication of what had been an unpublished opinion. In my view, that inquiry would examine whether the change that was made is, in and of itself, something that a party would have reason to appeal. I do not think the change here qualifies. The amendment the Court of Appeals ordered substituted one dictionary definition for another and made other conforming changes to the text; I do not believe these changes will substantively affect how any party litigates claims of this sort in the future. I agree with our clerk's office's initial conclusion that the change at issue was a clerical one which, therefore, did not reset the 42-day timeline plaintiff had to file in this Court, and I dissent from our order docketing his application.

All that said, the Court obviously has voted to docket plaintiff's application. That action having been taken, I concur with our order to direct argument on this application. The question presented is an interesting one that merits this Court's review. While I disagree with docketing the application, if it is to be docketed, I agree that we should order argument on it.

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I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 29, 2020

Clerk